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7 *(Application to be Admitted Pro Hac Vice to be Filed)*

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HOSTWAY CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

HOSTWAY CORPORATION, an Illinois Corporation,) No. C 07-3759 JCS
Plaintiff,)
v.)
IAC SEARCH & MEDIA, INC., a Delaware Corporation,)
Defendant.)
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**NOTICE OF MOTION AND
MOTION FOR TEMPORARY
RESTRANDING ORDER AND
ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES**

NOTICE OF MOTION AND MOTION

TO DEFENDANT IAC SEARCH & MEDIA, INC:

PLEASE TAKE NOTICE that plaintiff Hostway Corporation (“Hostway”) hereby applies for a temporary restraining order restraining defendant IAC Search & Media, Inc. (“defendant”), and its agents, servants, employees and attorneys, and all those in active concert or participation with defendant or them, from terminating the March 2, 2007 Advertising Services and Search Services Syndication Agreement (the “Syndication Agreement”), including but not limited to terminating, limiting or interfering with in any manner the Advertising Services and Search Services provided by defendant to Hostway pursuant to the Agreement as identified in Exh. A thereto (*i.e.*, the so-called advertising feed). Hostway further seeks an order to show cause why a preliminary injunction should not be granted enjoining defendant, its agents, servants, employees and attorneys and those in active concert or participation with defendant or them, from committing such acts.

This motion is made on the grounds that Hostway will suffer irreparable injury before the matter can be heard on regular notice because said acts of defendant threatens immediate and irreparable damage to Hostway in that such acts would: (i) destroy Hostway's numerous customer relationships that Hostway has developed related to the Syndication Agreement and the goodwill associated with those relationships; (ii) ruin Hostway's reputation as a reliable, high-quality provider of advertising and search services; (iii) effectively cause Hostway to be excluded from the advertising and search services businesses indefinitely; and (iv) cause Hostway to lose the entirety of its investment in its advertising and search services business.

This motion is based on the Complaint on file herein, and the Declaration of Namit Merchant and Memorandum of Points and Authorities filed concurrently herewith, and on such other matters and evidence as the Court considers.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Hostway Corporation (“Hostway”) submits the following memorandum in support of its motion to enjoin defendant IAC Search & Media, Inc. (“defendant” or “IAC”) from terminating the Advertising Services and Search Services Syndication Agreement dated as of March 2, 2007 (the “Syndication Agreement”), including but not limited to terminating, limiting or interfering with in any manner the Advertising Services and Search Services provided by defendant to Hostway pursuant to the Agreement as identified in Exh. A thereto (*i.e.*, the so-called advertising feed).

II. STATEMENT OF FACTS

Hostway is in the business of providing web-hosting and related services to its customers across the country and abroad. (See Declaration of Namit Merchant (“Merchant Decl.”) at ¶ 3.)

On March 2, 2007, Hostway entered into an Advertising Services and Search Services Syndication Agreement (the “Syndication Agreement” or “Agreement”) with defendant. Hostway entered into the Syndication Agreement for the purpose of offering its web-hosting customers advertising and search services, including the ability to search for, identify and post, related and appropriate advertising links on customers’ websites, drive web traffic to advertised sites, and thereby generate incremental revenue for Hostway’s web-hosting customers. (See Merchant Decl. at ¶¶ 8-11.)

In anticipation of the Syndication Agreement and since entering into it, Hostway has spent thousands of engineering hours and millions of dollars to optimize its systems to select and channel relevant and appropriate advertised sites for its customers, and to monetize web traffic driven to such sites by Hostway's customers' websites. (*See Merchant Decl. at ¶ 13 and Exh. 1 thereto.*)

Hostway has contracted with numerous customers or syndication partners, (including Comcast, Qwest and Cablevision) to provide them with advertising and search services

1 made available to Hostway under the Syndication Agreement. (See Merchant Decl. at ¶¶7, 8
 2 & 23.)

3 The Syndication Agreement is for an initial two-year term. While either party may
 4 elect to prevent the Agreement's automatic renewal for successive one-year renewal periods by
 5 sending advance written notice to that effect, the Agreement may be terminated during the initial
 6 two-year term only in the event of a material breach. Specifically, section 8.2 of the Syndication
 7 Agreement provides that:

8 This Agreement may be terminated if either party fails to cure any
 9 material breach of this Agreement within fourteen (14) days after
 such material breach is conveyed in reasonable detail in writing to
 10 the other party.

11 The Syndication Agreement also provides for immediate termination upon written
 12 notice under certain limited circumstances set forth in section 8.3 of the Agreement. (See Exh. 1 to
 13 Merchant Decl.)

14 Hostway has performed all of its obligations under the Syndication Agreement.
 15 (See Merchant Decl. at ¶¶16, 17 & 22.)

16 Pursuant to a letter dated July 17, 2007, defendant purported to terminate the
 17 Syndication Agreement "as a result of several breaches of the agreement by Hostway and other
 18 reasons as described" in the letter. (See Exh. 2 to Merchant Decl.) This letter was the first time
 19 that defendant had claimed that Hostway had breached -- let alone materially breached -- the
 20 Syndication Agreement in any respect. (See Merchant Decl. at ¶ 16.)

21 The first purported "breach" claimed in the July 17 letter was Hostway's supposed
 22 breach of section 3.7, which requires Hostway "to integrate the Ask.com search box as the default
 23 search box" for certain of Hostway's customers and "to engage in certain promotional efforts" on
 24 defendant's behalf. Hostway disputes that it has failed to perform its obligation under section 3.7
 25 of the Agreement, and the July 17 letter altogether fails to explain why it is that defendant believes
 26 Hostway has failed to perform under the Agreement. (See Merchant Decl. at ¶ 17 and Exh. 2.)
 27 However, even assuming that Hostway had not met its obligations under section 3.7 of the
 28 Syndication Agreement (which it denies), defendant's purported termination of the Syndication

1 Agreement on that basis without providing Hostway at least 14 days to cure such default is
 2 wrongful and in violation of the express terms of section 8.2 of the Agreement as set forth above.

3 The second purported "breach" alleged in the July 17 letter was defendant's
 4 "belief" that Hostway had disclosed confidential information of defendant and of a customer of
 5 defendant (and a competitor of Hostway) in an effort to convince the competitor's customers to
 6 use Hostway's services. (See Merchant Decl. at ¶ 19 and Exh. 2 thereto.) The July 17 letter does
 7 not indicate what confidential information defendant "believes" has been disclosed or even the
 8 basis of defendant's supposed belief. Moreover, the Syndication Agreement's confidentiality
 9 provisions concern confidential information of defendant and of Hostway, not information relating
 10 to any competitor of Hostway or any other third party. In any event, Hostway has not disclosed
 11 any confidential information of defendant or otherwise violated the confidentiality provisions of
 12 the Syndication Agreement. (See Merchant Decl. at ¶ 19.) Therefore, defendant's purported
 13 termination of the Agreement on this basis is also wrongful and in violation of the Syndication
 14 Agreement.

15 The final purported basis for termination stated in the July 17 letter was that an
 16 employee of Hostway -- who formerly had been employed by the same competitor whose
 17 confidential information Hostway supposedly disclosed -- allegedly encouraged customers of his
 18 former employer to switch to Hostway. The July 17 letter states that defendant's continued
 19 offering of services to Hostway under the Syndication Agreement would "disparage" defendant
 20 because of the alleged conduct of the competitor's former employee. (See Exh. 2 to Merchant
 21 Decl.) The July 17 letter does not provide any factual support for its accusation. Put simply, the
 22 claim is nothing more than a makeweight argument and their erstwhile termination of the
 23 Agreement on this basis is also wrongful.

24 Each and every one of the three stated bases for termination is factually groundless,
 25 contrary to the express terms of the Syndication Agreement and pretextual. Hostway believes the
 26 defendant has sought wrongfully, and in violation of the Syndication Agreement's express terms,
 27 to terminate the Syndication Agreement and to deprive Hostway of its rights thereunder, solely

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1 because Hostway's competitor has demanded that defendant terminate its contractual relationship
 2 with Hostway and has threatened to terminate its own relationship with defendant (which is far
 3 more lucrative to defendant than its relationship with Hostway) if defendant fails to do so.
 4 Hostway believes that for this reason alone, and not because of any purported breach of the
 5 Agreement by Hostway, defendant sent the July 17 letter purporting to terminate the Syndication
 6 Agreement.

7 If the Agreement is terminated, Hostway will suffer immediate and irreparable
 8 damage. More particularly, such termination would: (i) destroy Hostway's numerous customer
 9 relationships that Hostway has developed related to the Syndication Agreement and the goodwill
 10 associated with those relationships; (ii) ruin Hostway's reputation as a reliable, high-quality
 11 provider of advertising and search services; (iii) effectively cause Hostway to be excluded from the
 12 advertising and search services businesses indefinitely; and (iv) cause Hostway to lose the entirety
 13 of its investment in its advertising and search services business. (See Merchant Decl. at ¶¶ 23-25.)

14 III. **LEGAL ARGUMENT**

15 A. Applicable Legal Standard -- Preliminary Injunction

16 It is well-settled that the basis for preliminary injunctive relief in the federal courts
 17 is irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456
 18 U.S. 305, 312 (1982); *Stanley v. Univ. of So. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1984).

19 In this Circuit, a plaintiff is entitled to injunctive relief if it establishes (i) "either a
 20 likelihood of success on the merits and the possibility of irreparable injury or (ii) that serious
 21 questions going to the merits were raised and the balance of hardship tips sharply in its favor."
 22 *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d, 1510, 1517 (9th Cir. 1992); *see also Dept. of Park &*

23 Rec. for State of Cal., 448 F.3d 1118, 1123 (9th Cir. 2006) [same].¹ "These two formulations
 24 represent two points in a sliding scale in which the required degree of irreparable harm increases as
 25 the probability of success decreases." *Arcamuzi v. Continental Airlines, Inc.*, 819 F.2d 935, 937

26
 27 ¹ A "serious question" means questions that involve a "fair chance [of success] on the
 28 merits." *Sierra Online, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984).

1 (9th Cir. 1987), *citing Oakland Tribune Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376
 2 (9th Cir. 1985).

3 These tests have been described as essentially the same and as representing the
 4 “opposite ends of the single-continuum in which the required showing of harm varies inversely
 5 with the required showing of meritousness.” *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d
 6 1215, 1217 (9th Cir. 1987). Put another way, “[the] critical element in determining the test to be
 7 applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the
 8 plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when
 9 the balance tips less decidedly.” *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir.
 10 1988).

11 B. Hostway is Likely to Succeed on the Merits Because the Purported
 12 Termination of the Syndication Agreement is Wrongful

13 Under the 9th Circuit’s sliding scale test for preliminary injunctions, the party
 14 seeking provisional injunctive relief must, as a “irreducible minimum . . . demonstrate a fair
 15 chance of success on the merits, or questions serious enough to require litigation.” *Arcamuzi,*
 16 *supra*, 819 F.2d at 937. Hostway’s “fair chance of success” here is easily demonstrated.

17 As explained above in more detail and in the accompanying Declaration of Namit
 18 Merchant, defendant’s purported termination of the Syndication Agreement is wrong and
 19 entirely pretextual. Defendant will presumably claim otherwise. Nevertheless, for purposes of this
 20 motion, Hostway has more than established a fair chance of success on the merits.

21 To briefly recap, defendant purported to terminate the Syndication Agreement on
 22 three bases. Individually and collectively, defendant’s claims are meritless.

23 The first ground (Hostway’s purported failure to perform its obligations under
 24 section 3.7 of the Agreement) is simply false. (*See* Merchant Decl. at ¶¶ 16, 17 & 22.) Moreover,
 25 defendant was contractually required to provide Hostway with 14 days written notice of any
 26 material breach of this provision and an opportunity to cure any such breach pursuant to section
 27 8.2 of the Agreement. Even assuming that Hostway breached section 3.7 of the Agreement and

1 that its breach was "material" (which it denies), it is undisputed that defendant failed to provide the
 2 requisite notice and opportunity to cure.²

3 The second claimed basis for the termination (defendant's "belief" that Hostway
 4 improperly disclosed defendant's confidential information and the confidential information of a
 5 competitor) is also false. As an initial matter, the Syndication Agreement's requirements
 6 regarding the disclosure of confidential information only applies to the parties to the Agreement.
 7 (See Exh. 2 to Merchant Decl. at section 9.) In other words, even if Hostway disclosed the
 8 "confidential information" of one of its competitors, it would not be a breach of the confidentiality
 9 provisions in the Agreement. Remarkably, the July 17 letter fails to set forth any factual support
 10 for defendant's "belief" that Hostway disclosed any of defendant's confidential information.
 11 Regardless, Hostway has not disclosed any of defendant's information. (See Merchant Decl. at ¶
 12 19.)

13 The third and final basis for the termination is equally spurious. Defendant claims
 14 that Hostway has encouraged customers of one of its competitors to "breach their agreements"
 15 with the competitor and that such conduct -- which Hostway denies -- somehow disparages
 16 defendant (not the competitor). This assertion is absurd on its face.

17 As indicated in Mr. Merchant's Declaration, it is Hostway's belief that the real
 18 reason defendant is attempting to terminate the Agreement is that one of its largest customers (a
 19 competitor of Hostway) is pressuring it to do so. In all events, it is clear that the purported
 20 termination of the Syndication Agreement is devoid of any merit and that Hostway has far more
 21 than a fair chance of prevailing on its claims against defendant.

22 C. Hostway Will Suffer Irreparable Harm Unless the Termination of the
Syndication Agreement is Enjoined

23 If the termination of the Syndication Agreement is not enjoined -- in particular the
 24 "Advertising Services" and "Search Services" provided by defendant to Hostway pursuant to the
 25 Agreement -- Hostway will suffer enormous and irreparable harm.
 26

27 ² In fact, the July 17 letter was the first claim of any sort made by defendant that Hostway
 28 had breached the Agreement in any respect. (See Merchant Decl. at ¶ 17.)

First and fundamentally, if the Agreement is terminated, Hostway will suffer a significant and potentially ruinous loss of business. (See Merchant Decl. at ¶¶ 23-25.) As the Supreme Court has stated, a “substantial loss of business (and perhaps even bankruptcy) absent injunctive relief qualifies as irreparable injury.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). Second, and similarly, the inevitable and significant damage to Hostway’s goodwill if the Agreement is terminated constitutes irreparable harm for purposes of supporting a preliminary injunction. See, e.g. *Rent-a-Center, Inc., v. Canyon Television & Appliance*, 944 F.2d 597, 603 (9th Cir. 1991) (“[W]e have also recognized that intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm”), citing *Regents of Univ. of Cal. v. American Broadcasting Cos.*, 747 F.2d 511, 519-20 (9th Cir. 1984) [enjoining defendant school from refusing to televise the broadcast of a college football game where the plaintiff school cited “the impairment of their ongoing recruitment programs; the dissipation of alumni and community goodwill and support garnered over the years; placement of plaintiffs’ teams at a significant disadvantage for purposes of national ranking; the deprivation of the opportunity to showcase rivalries of unique tradition and moment in the ‘industry’; and a reduction in the attractiveness of the Pac-10-Big Ten Conference ‘product’ which would doom the Pac-10-Big Ten’s efforts to compete in the market.”]. Finally, if the Syndication Agreement is terminated, Hostway’s reputation with its customers will be irremediably damaged. Such damage to reputation has also been found to support injunctive relief. See, e.g., *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987).

D. The Balance of Hardships Tips Firmly in Hostway’s Favor

As indicated above, the harm to Hostway if the Agreement is terminated will be immediate and catastrophic. Such damage would include (i) the destruction of Hostway’s numerous customer relationships that Hostway has developed related to the Syndication Agreement and the goodwill associated with those relationships; (ii) the destruction of Hostway’s reputation as a reliable, high-quality provider of advertising and search services; the exclusion of Hostway from the advertising and search services businesses indefinitely; and (iii) the elimination

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1 of Hostway's entire investment in its advertising and search services business. (See Merchant
 2 Decl. at ¶¶ 23-25.)

3 In stark contrast, defendant will suffer no -- or at most little -- harm if it is
 4 compelled to honor its contractual obligations during the pendency of a temporary restraining
 5 order and, if appropriate as Hostway believes, a preliminary injunction. Furthermore, any harm
 6 that defendant may suffer can be adequately protected against by a bond. *See, e.g., Ohio Oil Co. v.*
 7 *Conway*, 279 U.S. 813, 815 (1929).

8 Under these circumstances, the balance of harm tips decidedly in Hostway's favor
 9 and supports the issuance of the requested relief.

10 **IV. CONCLUSION**

11 Unless enjoined, the purported termination of the Syndication Agreement will
 12 inflict irreparable harm on Hostway's business. Such damage cannot be measured or compensated
 13 for by an eventual award of money damages. Coupled with this significant threat of irreparable
 14 harm is the compelling evidence that Hostway will prevail on the merits of its claims at trial and
 15 the absence of any harm to defendant. For all of the foregoing reasons and those set forth in the
 16 accompanying Declaration of Namit Merchant, Hostway respectfully request that the Court enjoin
 17 the termination of the Syndication Agreement.

18
 19 DATED: July 23, 2007

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 21 A Professional Corporation

22 By: _____
 23


 24 C. Griffith Towle
 25 Attorneys for Plaintiff
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